

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In Re: BARBARA A JOHNSTON

Debtor.

Case No.: 10 – 13508
(chapter 13)

In Re: BARBARA A JOHNSTON

Plaintiff.

Adv. Proc. No.: _____

vs.

HSBC MORTGAGE CORPORATION (USA)

Defendant.

COMPLAINT

Barbara A. Johnston from the office of Executrix for the Legal Estate, BARBARA A JOHNSTON (hereinafter: the Plaintiff) alleges:

1. HSBC MORTGAGE CORP (USA) (hereinafter, "HSBC") does not qualify as a "real party of interest" pursuant to Rule 17 of the Federal Rules of Civil Procedure, which provides: "An action must be prosecuted in the name of the real party in interest." The purpose of this rule is to require that an action be brought "in the name of the party who possesses the substantive right being asserted under the applicable law..." 6A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1541 (1990) ("WRIGHT"). The analysis making the real party in interest rule applicable to relief from stay motions is complex. Rule 4001 provides: "A motion for relief from an automatic stay ... shall be made in accordance with Rule 9014," which provides procedural rules for contested matters. Rule 9014 provides, in turn, that many of the rules for adversary proceedings apply to contested matters. Among the adversary proceedings rules incorporated by reference in Rule 9014 is Rule 7017, which provides: "Rule 17 F.R.Civ.P. applies in adversary proceedings...." HSBC's obligation to meet the requirements of Rule 17 is a federal jurisdiction threshold issue. A party that seeks relief from stay must be a "real party in interest."

2. This matter springs from an Assignment of Mortgage which claims that an assignment occurred whereby Mortgage Electronic Registration Systems (hereinafter, "MERS") as nominee for HSBC assigned a mortgage to HSBC. (Exhibit A)

3. This assignment was unlawfully procured and constitutes extrinsic fraud and collusion.

FRAUD

4. Stephen Baum's office filed a Notice of Pendency on February 28, 2007 and the Plaintiff was served on March 3, 2007. (Exhibit B) Subsequently, the subject Assignment of Mortgage was executed on March 21, 2007. This assignment was endorsed by Bethany Hood, acting as Vice President of MERS. The assignment claims to be effective as of the 27th day of February 2007, the day before Stephen Baum's office filed a Notice of Pendency. In *MERS v. Coakley*, the Court ruled that postdates of this nature are ineffective [*MERS v. Coakley*, at 674; see also *Kluge v. Fugazy*, 145 AD2d 537 (2nd Dept. 1988)]. There being no evidence that the assignment was made prior to the commencement of the action, Plaintiff failed to establish that it was in possession of the mortgage at the time it commenced this action.

5. The primary focus here is whether or not the assignment was fraudulently executed to mislead and burden the state court and the foreclosure defendant and thereby achieve an objective of foreclosure judgment without standing.

6. On September 30, 2010, US Bankruptcy Judge Harry C. Dees, Jr., Northern District of Indiana, South Bend division, confronted head-on the widespread practice of employees of mortgage servicing companies signing mortgage assignments with false job titles. [*Koontz v. EverHome Mortgage and MERS*, case number 09-30024, Proc. No. 10-3005].

7. In the contested foreclosure, EverHome and MERS moved for Summary Judgment, while the plaintiff/homeowner argued that there were genuine issues of material fact that precluded Summary Judgment.

8. One such issue involved a mortgage assignment by Bethany Hood as Vice President of MERS. In 2007 Bethany Hood was a clerical employee of FIS Foreclosure Solutions Incorporated, aka LPS (hereinafter, "LPS") and who signed mortgage documents using fraudulent job titles. (Exhibit C)¹ Here is what the Court said about this:

"MERS, in its answer to the Plaintiff's complaint, admitted that Bethany Hood is not an employee of MERS. The debtor claimed that the document [assignment signed by Bethany Hood as a MERS officer] was fabricated

¹ In light of the foregoing information concerning Bethany Hood's credentials, it appears that she also fraudulently subscribed, on March 27, 2007, an Affidavit filed into the foreclosure action on behalf of of HSBC as their attorney in fact, claiming to be fully familiar with the facts and circumstances of this foreclosure action. (Exhibit D)

and MERS has offered no other explanation nor has it submitted proper authenticated documentation of an assignment. It appears to this court that a fraudulently recorded assignment of mortgage might still be found today in the St. Joseph's County Recorder's Office, despite MERS' knowledge of the false signature... Indeed, MERS has completely sidestepped the fact that this assignment was signed by someone representing herself to be a Vice President of MERS, and it has declined to explain why this false document was attached to the amended proof of claim... In the view of this Court, the conduct of the EverHome and MERS defendants -reflecting a lack of transparency and determination not to provide information or documents until required - has burden both the debtor and this court... In this case, the creditors have been forced to admit that a non-employee signed the assignment of mortgage, representing herself to be a Vice President of MERS and other banks or mortgage companies... Having determined that genuine issues of material fact exists, the court denies the motion for summary judgment filed by the EverHome Defendants and MERS”...

9. The Baum firm recently was sanctioned \$5000 for submitting pleadings with defects similar to the documents filed in this court. See Federal Home Loan MTG. Corp. v. Raia, 29 MIS C. 3d 1226(A), 2010 WL 4750043, 2010 NY slip op. 52003(U)(DIST. CT. Nassau Co. November 23, 2010).

10. That Court found that the Baum firm had filed a petition containing false statements that went directly to the heart of the matter of standing. Thus, the court found that the representations in the pleadings were intended to mislead the court as to the petitioner's standing. The state court judge called the Baum Firm's actions “reprehensible”:

[The Baum] firm is highly versed in issues of standing as evidence by the firm's abundance of litigation in this area. Specifically, Baum has recently faced numerous standing issues concerning assignment, for which it's cases were dismissed. [See Deutsche Bank National Trust Company v. McRae, 27 Misc.3d 247, 894N.Y.S.2d 720 (2010); Citigroup Global Markets Realty Corp. versus Randolph, 2009 N.Y. Slip Op. 52567(U) (2009); HSBC Bank USA, National Association versus Miller, 26 Misc. 3d 407, 889 N.Y.S.2d 430(2009).]

COLLUSION

11. As the regional trustee for HSBC The Baum firm colluded with LPS, Bethany Hood's employer and acting foreclosure servicer for HSBC, in devising the fraudulent assignment. In the deposition of Christian S. Hymer, an officer of LPS, taken on January 13, 2010 in the Western District of Washington case of Kristin Bain v. Metropolitan Mortgage Group Inc., et al., Mr. Hymer says in his testimony that the assignment in that

case, which was also endorsed by Bethany Hood and notarized by Paris Jackson, the same notary on the assignment in this case,² was generated by the foreclosing law firm, *aka* the regional trustee: “by signing the document, [Bethany Hood is] essentially attesting that the information on this appears to be accurate. *However, again, we rely upon the law firm to draft the document...*”(Page 91). Question: “ but from my understanding of what you told me earlier the request to sign the document would have come from regional trustee, the law firm, or ---”. Mr. Hymer: “Correct.” (Page 97-98) Question: “So in this scenario that you just gave me a few minutes ago, *a law firm drafts the document*, and it’s sent to LPS to see whether or not it's appropriate for LPS to sign the document. That's considered a support service?” Mr. Hymer: That's - that's part of the - Yeah. Correct. That would be one of the support services it would provide, and part of what the fee they would pay would include that activity. (Page 22) (emphasis added) (Exhibit E)

12. From this deposition we can ascertain that pursuant to the business model for servicing foreclosures, post foreclosure assignments would be generated by the law firm and endorsed by an LPS employee acting as a vice president for MERS. In the instant case Stephen J. Baum, PC, was acting as the regional trustee for HSBC. Hence, the instant assignment was drafted by the Baum law firm and electronically forwarded to the LPS facility located in Minnesota for the “nominee” endorsement of Ms. Hood. This document was generated to fraudulently advance a foreclosure action and clearly does not qualify as a valid contract between parties.

13. The state court and the foreclosure defendant were not aware of Ms. Hood's true status as what has come to be known as a Robosigner, or a robotic clerk for a strawman entity, nor were those parties aware of the law firm’s role in advancing the MERS Member’s business model. In an Eastern District of New York Bankruptcy Court decision, *Re Argent*, handed February 10, 2011 (case no. 8-10-77338-reg), the court found that the MERS business model was not consistent with the lawful transfer of securities nor does its nominee relationship create a nexus of agency that would give Robosigners, such as Bethany Hood, the authority to endorse Assignments. The court concluded that “MERS’s position that they can be both the mortgagee and an agent of the mortgagee is absurd, at best.”

14. HSBC stood upon a fraudulent document to maintain the appearance of standing in the foreclosure action. Without valid proof to substantiate their cause of action they lacked standing. The Stephen J. Baum law firm and LPS are guilty of extrinsic fraud in that they colluded to generate a fraudulent assignment of mortgage to make it appear as though HSBC had standing to foreclose on the subject property.

RATIFICATION OF COMMENCEMENT

² Note: The mortgage assignment recorded in New York State in the instant case has the same endorsement and notarization executed in the LPS Minnesota foreclosure services office as the mortgage assignment recorded in Washington State involving separate financial institutions with MERS functioning as some sort of universal agency nexus.

15. Because the fraud is extrinsic in nature, HSBC is precluded from raising the doctrine of *res judicata* as a defense against this Court's obligation to verify first and foremost that the claimant has federal jurisdiction "real party in interest" status.

16. HSBC must comply with the applicable procedures of federal court. Two such procedures stand in the way of granting the motion for relief from stay in this case. The first procedural problem arises from the real party in interest rule.

17. Because there are material, factual and legal issues as to subject matter and *in persona* jurisdiction under rules 17 (a)(3), and 12b(1)(2)(6) and (7) do to the lack of Ratification of Commencement by the Real Parties in Interest that needs to be addressed by this Court and its Trustees *sua sponte* as a threshold issue under Article 3 § 2 of national Constitution, this court should not grant and/or should not have granted a motion for relief of stay as a party that seeks relief from automatic stay must be a "real party in interest" 11 U.S.C.A § 362(d); Fed. Rules Bankr. Proc. Rules 4001, 7017, 9014, 11 U.S.C.A. Re Kang Jin Hwang 396 B.R. 757. Bkrcty. C.D. Cal., 2008. October 29, 2008:

Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Hence, "a defect in standing cannot be waived; it must be raised, either by the parties or by the court, whenever it becomes apparent." *U.S. v. AVX Corp.*, 962 F.2d 108, 116 n. 7 (1st Cir.1992). The inquiry into standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III," *Id.*

18. The Rooker-Feldman doctrine cannot override the requirement of any party advancing a claim in federal court to pass the "Real Party in Interest" test. The Second Circuit has delineated four elements that must be satisfied in order for Rooker-Feldman to apply:

First, the Federal Court plaintiff must have lost in state court. Second, the plaintiff must "complain of injuries caused by a state-court judgment." Third, the plaintiff must "invite district court review and rejection of that judgment." Fourth, the state-court judgment must have been "rendered before the district court proceedings commenced". See *Roslyn Savings Bank v. Comcoach* (In re Comcoach), 698 F.2d 571, 573 (2d Cir. 1983).

19. The plaintiff in this case is not complaining of injuries caused by a judgment nor inviting a review and rejection of the judgment based on its merits or reasoning. The plaintiff merely asks this Court to, first;

make a determination as to whether or not *ratification of commencement* has occurred, and secondly;

to consider whether the Assignment of Mortgage that's attached to HSBC's B 10 claim was extrinsically fraudulent or does it qualify as merely an instrument associated with the issue that gave rise to the Foreclosure Action.

Wherefore, the Plaintiff requests that this Court re-impose a stay on further action of HSBC against the Plaintiff until ratification of commencement has occurred regarding HSBC's cause of action.

Executrix for Office of Decedent